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FEDERAL ELECTION COMMISSION
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FIRST GENERAL COUNSEL'S REPORT

MUR: 6348

DATE COMPLAINT FILED: August 10, 2010

DATE OF NOTIFICATION: August 17, 2010

RESPONSE RECEIVED: September 2, 2010

DATE OF ACTIVATION: October 21, 2010

STATUTE OF LIMITATIONS: July 26, 2015 –
July 31, 2015

COMPLAINANT:

Luis A. Heredia, Arizona Democratic Party

RESPONDENTS:

David Schweikert for Congress and
Joyce Schweikert, in her official capacity as
treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(23)
2 U.S.C. § 441d
11 C.F.R. § 100.26
11 C.F.R. § 110.11(c)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that David Schweikert for Congress ("the Committee"), the principal campaign committee of Arizona 5th District Congressional candidate David Schweikert, deliberately obscured the required disclaimer on a mailer that attacked Jim Ward, his opponent in the Republican primary election.¹ The mailer is appended to the complaint, and a high-quality copy of the mailer is attached to this report as Attachment 1. The mailer, which the complaint states was distributed during the last week of July 2010, attacks Ward's stance on immigration

¹ David Schweikert won the 2010 Republican primary election with approximately 37% of the vote in a field of six candidates. Jim Ward received the second highest percentage of the vote with approximately 26%. Mr. Schweikert won the general election.

1 and the timing of his move to Arizona. The mailer contains the disclaimer "Paid for by
2 Schweikert for Congress" printed vertically on the upper right side of the mailer. The disclaimer
3 is printed in gold type over a photograph of San Francisco viewed from the Golden Gate Bridge.
4 The mailer is 11 inches wide by 5.5 inches tall. The complaint alleges that the placement of the
5 disclaimer was an attempt to escape accountability for the negative message of the mailer and is
6 a violation of the requirements for a "clear and conspicuous" disclaimer contained in the Federal
7 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations. See
8 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c).

9 The Committee's response asserts that the complaint should be dismissed because the
10 disclaimer satisfies the requirements of 11 C.F.R. § 110.11(c). The response states that the
11 disclaimer is clear and conspicuous, adequately informs the reader that the Committee paid for
12 the mailer, appears to be printed in 12-point font, is set forth in a printed box, is printed using
13 adequate color contrast, and appears on the front of the mailer.

14 Considering the complaint and the response, we recommend that the Commission find
15 reason to believe that David Schweikert for Congress and Joyce Schweikert, in her official
16 capacity as treasurer, violated 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c) because the
17 disclaimer's vertical placement, combined with its gold type over a varied background, make it
18 easily overlooked, and not clear and conspicuous. We also recommend that the Commission
19 authorize conciliation with the respondents prior to a finding of probable cause to believe.

II. FACTUAL AND LEGAL ANALYSIS

All public communications made by a political committee must include disclaimers.

2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1). Public communications include any mass mailing to the general public or any other form of general public political advertising. 11 C.F.R. § 100.26.

A mass mailing is defined as more than 500 pieces of substantially similar mail within any 30-day period. 2 U.S.C. § 431(23); 11 C.F.R. § 100.29. Any communication through mass mailing paid for by a candidate or an authorized political committee of a candidate must clearly state that the communication has been paid for by the authorized political committee. 2 U.S.C.

§ 441d(a); 11 C.F.R. § 110.11(b). For printed communications, the Act and Commission regulations specify that the disclaimer be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other contents of the communication, and be printed with a reasonable degree of color contrast between the background and the printed statement. 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c). The Commission's regulations also specify that a disclaimer notice must be "presented in a clear and conspicuous manner." A disclaimer is not "clear and conspicuous" if the print is "difficult to read" or if the placement is "easily overlooked." 11 C.F.R. § 110.11(c)(1).

With respect to type size, the Commission established a safe harbor for 12-point type size for disclaimer text in newspapers, magazines, flyers, signs, and other printed communications that are no larger than 24 inches by 36 inches. 11 C.F.R. § 110.11(c)(2)(i). With respect to color contrast, the Commission established a safe harbor if the disclaimer is printed in black text on a white background, or if the degree of color contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. 11 C.F.R. § 110.11(c)(2)(iii). The

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Commission's Explanation and Justification for 11 C.F.R. § 110.11 states that these are not the only ways to satisfy the color contrast requirements, but that the safe harbor approach is "intended to provide a clear, flexible safe harbor that will ensure that the disclaimer does not blend in with the background of the communication any more than a headline or other key part of the core message text." See Explanation and Justification for Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76962, 76966 (December 13, 2002).

Although the complaint and the response do not address the number of mailers distributed, it is likely that the Committee distributed over 500 mailers, and, therefore, the disclaimer requirements apply. The Committee's disclosure reports include contemporaneous payments to printing vendors ranging from approximately \$5,000 to \$26,000, suggesting that over 500 mailers were distributed.²

The disclaimer meets some of the requirements in the Act and regulations – it states that it is paid for by Schweikert for Congress, it is printed in what appears to be 12-point font, and it is contained in a printed box. However, the disclaimer fails other requirements of the Act and regulations – it is not clear and conspicuous, is not printed with a reasonable degree of color contrast between the background and the printed statement, and is not set apart from the other contents of the communication.

First, the placement of the disclaimer makes it "easily overlooked," not "clear and conspicuous." See 11 C.F.R. § 110.11(c)(1). It is printed vertically – perpendicular to all the

² If the Commission finds reason to believe a violation occurred and authorizes pre-probable cause conciliation, and during the course of conciliation respondents produce information demonstrating that fewer than 500 mailers were distributed, we would bring that fact to the Commission's attention and recommend no further action be taken. We also note that respondents did not assert in their response that fewer than 500 copies were mailed.

1 other text in the mailer – on the upper right side of the mailer over a photograph. This placement
2 makes the disclaimer difficult to locate unless the reader specifically searches for it.

3 Further, the disclaimer is not printed with a “reasonable degree of color contrast between
4 the background and the printed statement.” See 2 U.S.C. § 441d(c)(3). The disclaimer is printed
5 in gold type over a multi-colored photograph, causing some of the printing to blend in with the
6 background, making it difficult to locate and read. The outline of the box around the disclaimer
7 is printed to line up with the cables of the bridge in the background photograph, making the box
8 difficult to distinguish from the background. The gold print of the disclaimer over the dark blue
9 of the water, the light and dark city buildings, and the dark blue of the sky in the photograph is
10 difficult to read, and the part of the disclaimer that is superimposed over city buildings in the
11 photograph is especially difficult to read.

12 Neither of the safe harbor standards for color contrast in the regulations is met because
13 the disclaimer is not printed in black text on a white background and the largest text in the
14 communication is printed at a higher contrast from the background color. See 11 C.F.R.
15 § 110.11(c)(2). The contrast between the red and black type and the mailer’s yellow background
16 and the contrast between the white and gold type and the mailer’s black background are far
17 greater than the disclaimer’s contrast with the photograph against which it is superimposed. The
18 disclaimer does not meet the goal of the safe harbor “that the disclaimer does not blend in with
19 the background of the communication any more than a headline or other key part of the core
20 message text.” See 67 Fed. Reg. at 76966.

21 Finally, the disclaimer is not “set apart from the other contents of the communication”
22 because it is printed over a photograph. See 2 U.S.C. § 441d(c)(2). The failure to set the

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1 disclaimer apart is particularly significant where the disclaimer blends in with the photograph, as
2 explained above.

3 Matters involving disclaimers are often handled through the Enforcement Priority System
4 ("EPS"); however, this matter merits Enforcement action because the obscuring of the disclaimer
5 through its placement and color contrast appears to be by design, and this matter differs from
6 typical matters involving failure to include the required box around the disclaimer, vendor error,
7 or inadvertent error followed by prompt remedial action. See, e.g., MUR 6316 (Pridemore for
8 Congress) (Commission dismissed matter where a committee failed to include the required box
9 around disclaimers on several communications and made inadvertent wording errors in
10 disclaimers on other communications but took prompt remedial action); MUR 6118 (Bob Roggio
11 for Congress) (Commission dismissed matter where a committee failed to include the required
12 disclaimer on a billboard due to a vendor production error but took remedial action when it
13 became aware of the error); MUR 6329 (Michael Grimm for Congress) (Commission dismissed
14 matter where a committee failed to include the required disclaimer on lawn signs but took
15 remedial action by placing stickers containing the required disclaimer on the signs).
16 Additionally, this matter differs from matters typically handled through EPS because the mailer
17 at issue contains no information to identify its source other than the disclaimer, which is the only
18 part of the mailer that references David Schweikert or his Committee, who paid for and
19 authorized the mailer. See MUR 6278 (Joyce B. Segers) (Commission dismissed matter where a
20 committee failed to include a disclaimer on campaign materials but the public could reasonably
21 discern that the committee produced the information from its contents and the committee took
22 remedial action).

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1 In sum, the disclaimer does not satisfy the requirements in the Act and Commission
2 regulations. Accordingly, we recommend that that the Commission find reason to believe that
3 David Schweikert for Congress and Joyce Schweikert, in her official capacity as treasurer,
4 violated 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c).

5 **III. CONCILIATION**

6 We recommend that the Commission authorize pre-probable cause conciliation with the
7 respondents for their violations of 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c).

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IV. RECOMMENDATIONS

1. Find reason to believe that David Schweikert for Congress and Joyce Schweikert, in her official capacity as treasurer, violated 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c).
2. Approve the attached Factual and Legal Analysis.
3. Authorize conciliation prior to a finding of probable cause to believe;
4. Approve the attached Conciliation Agreement;
5. Approve the appropriate letter.

Christopher Hughey
Acting General Counsel

12/16/10
Date

BY:

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